NORWEST HOLDINGS SDN BHD

v.

MUHIBBAH ENGINEERING (M) BHD

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT1-22-812-2001]
18 OCTOBER 2004

CIVIL PROCEDURE: *Rules of court - Non-compliance - Application to strike out action - Effect of amendments to Rules of the High Court 1980 - Rules of the High Court 1980, O. 1A, O. 2 r. 3*

CIVIL PROCEDURE: *Striking out - Action for damages - Grounds for - Effect of amendments to Rules of the High Court 1980 - Whether triable issues existed - Rules of the High Court 1980, O. 1A, O. 2 r. 3*

CONTRACT: *Agreement - Agreement by parties to set up consortium for purpose of securing a turnkey project - Defendant tendered separately and successfully for same project - Whether defendant had breached agreement*

This was an appeal by the plaintiff against the decision of the learned senior assistant registrar allowing the defendant's application to strike out the plaintiff's action for damages as a result of the defendant's breach of a pre-bid agreement and/or breach of its fiduciary duty as co-partner of a consortium, which was set up by the plaintiff, defendant and another company for the purpose of securing a turnkey project from one Bintulu Port Sdn Bhd. The plaintiff alleged that the defendant, in tendering separately and successfully through an open tender on an individual basis for the same project, had acted to the detriment of and in direct competition with the consortium, thus reneging on its agreement. The open tender had been made by one Bintulu Port Authority. The defendant's application under O. 18 r. 19 and O. 92 r. 4 of the Rules of the High Court 1980 ('the RHC') to have the matter struck out succeeded despite the fact that: (i) the pleadings were deemed closed; (ii) the defendant had failed to file a conditional appearance; and (iii) the defendant had reneged on its promise when it had individually tendered for the project for its own benefit. The main issue of contention was whether the agreement of the consortium covered contracts issued by the Bintulu Port Authority.

Held (dismissing the appeal):

[1] The law as regards the timing of when a striking out action may be undertaken has changed. As a result of the new amendments to the RHC 1980 by PU(A) 197, the administration of justice of the particular case now takes top spot, and slavish non-compliance of procedures and rules takes a back seat. The application under O. 18 r. 19 of the RHC certainly fell within the ambit of the spirit of the new O. 2 r. 3 and O. 1A of the RHC. Restricting the definition of the phrase "at any stage of the proceedings" in O. 18 r. 19 of the RHC to mean, *inter alia*, that no application would be entertained if there was no promptitude in the striking out application, or if pleadings had been closed, or if a conditional appearance had not been filed, would result in outright denial of the court's right to exercise its discretionary functions that were statutorily built into that very provision. Any allusion therefore to the unamended RHC and pre-16 May 2002 cases by the plaintiff in support of its case, when proposing the preliminary objections, was doomed to meet failure. (pp 404 e, 406 c-e & 407 c-d)

[2] It was indisputable from the agreed facts that Bintulu Port Sdn Bhd and Bintulu Port Authority were different and separate entities; hence, they had their respective legal persona. A perusal of the consortium agreement clearly showed that it was set up only to net the turnkey project to be tendered out by Bintulu Port Sdn Bhd. Nothing connected the agreement to Bintulu Port Authority, which was legally an absolutely different person or entity. If the agreement were to cover the latter too, then surely it would also cover any of the defendant's contracts with, say, an individual, Malaysian Airline System, Bintulu Gas Authorities, Bintulu Waterworks and the like. There would, thus, be no end to it or the width of that agreement. As a result thereof, this court had no hesitation in deciding that the defendant was entitled not to be bound by the agreement. Since there were no triable issues left for consideration, this appeal was accordingly dismissed. (p 408 a-c)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(not foll)***

Anchorage Mall Sdn Bhd v. Irama Team (M) Sdn Bhd & Anor [2001] 7 CLJ 313 HC ***(not foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorraine Esme Osman [1987] 2 MLJ 633 ***(refd)***

Concrete Engineering Products Bhd v. Merces Builders Sdn Bhd [2004] 2 CLJ 531 HC ***(refd)***

Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co & Ors [2001] 4 CLJ 446 HC ***(refd)***

Government of State of Pahang v. Tengku Abdul Aziz & Anor [1978] 2 MLJ 34 ***(refd)***

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd [2002] 1 CLJ 602 HC ***(refd)***

N Carrupaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC ***(refd)***

Tan Lay Soon v Kam Mah Theatre Sdn Bhd [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 743 HC ***(not foll)***

TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd [1985] 2 MLJ 45 ***(refd)***

Tucker v. Collinson 34 WR 354 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 17

Rules of the High Court 1980, O. 1A, O. 2 rr. 1, 3, O. 18 r. 19, O. 34 rr. 2, 3, O. 92 r. 4

Other source(s) referred to:

Mallal's Supreme Court Practice, 2nd edn, p 226

For the plaintiff - Lim Chong Fong (Sonia Abraham); M/s Azman Davidson & Co

For the defendant - Pradeep Kumar; Sykt KL Rekhraj

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:

The plaintiff had entered into a pre-bid agreement (hereinafter referred to as the pre-bid agreement), with the defendant and another company called Ken Holdings Berhad, to form a consortium. It was solely set up for the purpose of securing a turnkey project and executing the works for the construction and completion of LNG 3, Jetty Project on Negotiated Basis at Bintulu, Sarawak (hereinafter referred to as the project) from Bintulu Port Sdn Bhd. In a gist, they wanted to cast a broad based net, wherein they would co-operate in a joint effort manner to secure the above project from Bintulu Port Sdn Bhd. That consortium later would do business in the name of 'KHB-MEB-NHSB'. Naturally the fruits of their success would be shared among them.

The plaintiff had alleged that Muhibbah Engineering (M) Sdn Bhd, the current defendant, had reneged on their agreement when it acted to the detriment of and in direct competition with the consortium. The defendant was accused to have tendered separately on an individual basis for the same project, through an open tender, and had come out successful when on 23 August 1999 had solely accepted the award.

The plaintiff had subsequently commenced an action against the defendant, and had claimed damages, as a result of the defendant's breach of the pre-bid agreement and/or breach of its fiduciary duty as co-partner of the consortium. The plaintiff had also demanded that an account of all profits received by the defendant for the execution of the project be divulged.

In response to the writ, the defendant had filed an application pursuant to O. 18 r. 19 and O. 92 r. 4 of the Rules of the High Court 1980, to have the matter struck out. It was a brave effort on the part of the defendant to pursue this line, as it is only in plain and obvious cases that recourse should be had to this summary process. This procedure may be pursued if the claim on the face of it is "obviously unsustainable" (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). Despite the appearance of a battle royal case the defendant had succeeded in its attempt to strike out the writ before the senior assistant registrar. Being dissatisfied with the decision the plaintiff had filed the notice of appeal before the judge in chambers. I had heard the appeal on the premise of a rehearing and had accordingly on 5 August 2004 dismissed the appeal with costs. I now supply my reasons for the dismissal.

My decision would appear strange in the light of:

1. the pleadings having been closed;

2. the defendant having failed to file a conditional appearance; and

3. despite parties having voluntarily agreed to form the consortium to obtain a contract from Bintulu Port Sdn Bhd, and with the defendant having reneged in its promise, when it had individually tendered for the project for its own benefit.

The facts revealed that the pleadings were deemed closed on 18 March 2002. In fact the plaintiff had even filed its notice to attend pretrial case management before the High Court on 5 April 2002 and with that notice having been served eight days later. Despite Form 63 having been filed, the defendant had still filed its summons in chambers to strike out the writ and statement of claim on 18 June 2002. The plaintiff before me had diligently supplied me with authorities, which were meant to support their

stance that as the striking out application had been filed too late in the day, the application was a non-starter. I was also not unaware of the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 743, where the learned judge had held, amongst others, that a striking out application must normally be made before the close of pleadings. In that case the issue and effect of O. 34 r. 2 RHC 1980 was also discussed. From the opening page of the case it was quite obvious that the decision was pronounced by the learned judge on 19 July 2001.

The position of the defendant appeared more untenable as it was compounded by the fact that it had filed an unconditional appearance on 20 December 2001. The plaintiff in support of its stance had ventilated that the defendant should be precluded from filing an application under O. 18 r. 19, and in support of it, had adverted to cases in the like of *Anchorage Mall Sdn Bhd v. Irama Team (M) Sdn Bhd & Anor* [2001] 7 CLJ 313 and *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461.

Despite those persuasive authorities, it is my view that the law as regards the timing of when a striking out action may be undertaken, has changed. There is no necessity for me to comprehensively set out a dissertation on the shift, and how it came about, but suffice for me to allude to P.U (A) 197 which has its effective date from 16 May 2002. This date is factually past the dates of the above cases supplied by the plaintiff.

In exercise of the powers conferred by s. 17 of the Courts of Judicature Act 1964 (Act 91), and with the consent of the Chief Judges of the High Court in Malaya and of the High Court in Sabah and Sarawak, the Rules Committee had made certain amendments. The eventual effect was the promulgation of O. 1A in the abovementioned PU (A) 197, by which promulgation, in the administration of any of the rules herein, the court or a judge shall have regard to the justice of the particular case, and not only to the technical non-compliance of the rules supplied in the Rules of the High Court 1980 (PU (A) 50/80). Order 2 of the principal Rules of the High Court was also amended by inserting after it the following rule:

> Preliminary objection for non-compliance of rales not allowed (O. 2 r. 3)
>
> 3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

The above amendment, as I see it, is merely streamlining the statutory law that is already in existence, especially in the like of O. 2 r. 1, which reads:

> 1 Non-compliance with rules (O. 2 r. 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

In brief the above provision provides that failure to comply with the requirements of the rules would be construed as mere irregularity and not as a nullity. In effect, the amendments (O. 1A and O. 2 r. 3) have merely placed all technical objections at its rightful place, ie, irrelevant if it defeats the purpose of justice (*Government of State of Pahang v. Tengku Abdul Aziz & Anor* [1978] 2 MLJ 34); *Concrete Engineering Products Bhd v. Merces Builders Sdn Bhd* [2004] 2 CLJ 531.

With the amendment being statutory in nature, and being the latest law, how could I not but be bound by it?

A brief sight of O. 18 r. 19 RHC 1980, certainly does not indicate anywhere the mandatory requirement that a striking out action application must be undertaken within a specific time frame (*Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co (sued as a firm) & Ors* [2001] 4 CLJ 446; *N. Carrupaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116; *Tucker v. Collinson* 34 WR 354; *Mallal's Supreme Court Practice*, 2nd edn, p. 226). The provision in no uncertain term states that the court may at any stage of the proceedings, order to be struck out, on the ground that the writ or any pleading discloses no reasonable cause of action or defence, as the case may be, or it is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or it is otherwise an abuse of the process of the court (by analogy see *T.R Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd* [1985] 2 MLJ 45; *Tan Lay Soon v. Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, intervener* [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657). Nothing is stated in it by whatever form that once pleadings are closed all striking out actions thereafter will be barred.

The above argument applies equally to situation where an applicant had already filed an unconditional appearance. Nothing is provided for under O. 18 r. 19, stating that to strike out the writ a conditional appearance must be filed first, or that once an unconditional appearance has been filed, an interested person is precluded from making an application of striking out on the given grounds (*N. Carrupaiya v. MBF Property Services Sdn Bhd & Anor; Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd* [2002] 1 CLJ 602; *Bank Bumiputra (M) Bhd & Anor v. Lorraine Esme Osman* [1987] 2 MLJ 633; *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773).

To have an inhibitive interpretation of the above provision would necessitate the importation of inhibitive factors which would militate against the grain of that provision. To restrict the definition of the phrase "at any stage of the proceedings" to mean, *inter alia*, that no application would be entertained if there were no promptitude in the striking out application, or if once pleadings have been closed, or conditional appearance have not been filed, without subjecting the restrictions merely on the preconditions of sub-rule 1(a), (b), (c) or (d), would result in outright denial of the court's right to exercise its discretionary functions, not only supplied in other provisions but statutorily built into that very provision of O. 18 r. 19. Without permitting the court to take into account the justice of the matter, but imposing and subjecting the court with debilitating self-made procedural corralling, will do injustice to the very function of the provision, let alone justice itself. If Parliament has the foresight to trust the wisdom of the court to act wisely with the wide discretion, why should interpretations be made, which deliberately snubs that trust?

Needless to say, it is fundamental in our justice system that the entire proper adherence or non-adherence of the rules and procedures laid down in the Rules of the High Court 1980, eventually must subject itself to the higher calling of justice. To arrive at that pinnacle platform there must be powers provided for, in the like of inherent powers, to be adverted to only when needed. And thankfully that power is sufficiently provided for in the catch all provision of O. 92 r. 4. This statutory provision promulgated by Parliament, which empowers the courts with the necessary veto power to act as the vanguard of justice is not mere legislative wallpaper. That power, which must, by necessity not to be invoked arbitrarily, is not curtailed by any time factor or happenings and statutorily may be invoked at any stage of the proceedings.

On reflection, if under O. 34 r. 3 RHC 1980 a court may in its absolute discretion make any order as meets the end of justice, amongst others, striking out the action or defence, using a general power concretized by O. 92 r. 4 and put into effect by O. 34 r. 3, surely sends out a strong message that a court may strike out a case at any stage if the need arises. Under O. 34 the draconian act of striking out can be ignited and considered, merely on the premise that the relevant party had failed to appear in court, on the return date as indicated in the relevant Form 63 (let alone on substantive grounds pursuant to an O. 18 r. 19 application).

Now, with the new amendments to the RHC 1980 by PU (A) 197, any last lingering doubt is put to rest. The administration of justice of the particular case now takes top spot, and slavish non-compliance of procedures and rules, takes a back seat. Returning to the main stream, the O. 18 r. 19 application certainly fell within the ambit of the spirit of the new O. 2 r. 3 and the new O. 1A of the Rules of the High Court 1980. Any allusion therefore to the unamended Rules of the High Court 1980 and pre-16 May 2002 cases by the plaintiff in support of its case, when proposing the preliminary objections, was doomed to meet failure.

I now proceed and identify the substantive point that justified my striking out of the writ. For purposes of this case I need only identify one ground, and the answer came in a singular package of factual and legal poser. It was indisputable from the agreed facts, that the Bintulu Port Sdn Bhd and the Bintulu Port Authority were different and separate entities, to be succinctly affirmed again during the plaintiffs own submission.

The additional agreed facts were that the plaintiff was appointed as the lead operator to submit the anticipated tender for the abovementioned project by Bintulu Port Sdn Bhd. Incontrovertibly not only did the plaintiff fail to do that, but even the open tender made by Bintulu Port Authority. The invitation made by the latter was an open tender, made through the New Straits Times dated 3 January 1998 inviting and calling upon all contractors to bid for it. That invitation was never done surreptitiously, and now for its proactive diligence, the defendant was required to share its profits with the unproductive plaintiff. Interestingly enough the other copartner in the consortium never even made a whimper.

With the facts and law being crystal clear, the next step to be undertaken was to decide whether the agreement of the consortium, also covered any contracts issued by the Bintulu Port Authority. If the answer were to be in the negative, was the defendant right in tendering for that successful project whilst the plaintiff merely folded its arms?

It was an effortless exercise on my part, as after being aided by the agreed facts that the Bintulu Port Sdn Bhd and the Bintulu Port Authority were different and separate entities, it meant that they had their respective legal persona. A perusal of the consortium agreement clearly showed that the agreement was set up only to net the abovementioned turnkey project to be tendered out by Bintulu Port Sdn Bhd. Nothing connected the agreement to the Bintulu Port Authority, which was legally an absolutely different person or entity. If the agreement were to cover the latter too, then surely it would also cover any of the defendant's contracts with, say an individual, Malaysian Airline System, Bintulu Gas Authorities, Bintulu Waterworks and the like. There would thus be no end to it or the width of that agreement.

After that effortless exercise, I had no hesitation in deciding that the defendant was entitled not to be bound by the agreement. Without any triable issue left for consideration before me I had accordingly dismissed the appeal with costs.